No. 16,055

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE ANACONDA COMPANY, a corporation,
Appellant,

vs.

BUTTE MINERS' UNION NO. 1 OF THE INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, et al.,
Appellees.

APPELLANT'S REPLY BRIEF

W. M. KIRKPATRICK,
P. L. MacDONALD,
SAM STEPHENSON, JR.,
JOSEPH B. WOODLIEF,
R. LEWIS BROWN, JR.,
WILLIAM J. KELLY,
Hennessy Building,
Butte, Montana,
Attorneys for Appellant.

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ARGUMENT

It would appear from the reading of the brief of appellees that it is designed to lead the Court to believe that appellant is trying to defend this suit on the grounds it has a defense to the termination of 68-year-old employees under the provision of the pension plans. That is not the case at all. We have not and do not intend to argue the merits of that dispute before this Court for we do not believe such an argument is relevant in this case.

The question of whether or not the appellant has the right to terminate 68-year-old employees without

a pension is not involved here. The question to be decided is whether or not *any question regarding the interpretation and application of the pension plans is subject to arbitration under the provisions of the collective bargaining agreements.*

Appellant reiterates that it was never the intention of the parties to make the pension plans subject to arbitration under the collective bargaining agreements and that the evidence that such was not its intent is conclusively shown by the provisions of the pension agreements and pension plans.

Reference is made in appellees' brief (pp. 8 and 9) to the decision of Dean J. D. Hyman of the University of Buffalo School of Law. This arbitration decision has no relevancy to this case as admittedly the parties in that case voluntarily agreed to submit the question of arbitrability to the arbitrator. Obviously the parties can mutually agree to pursue such a course and waive any right to have their day in court. However, it does not follow that appellant must also waive its rights under the pension agreements and plans to have the question of arbitrability of disputes arising out of the interpretation or application of the provisions of the pension plans decided by a court of law.

On page 11 of appellees' brief we find the same theme that runs throughout the entire brief; i. e., that appellant is trying to have the question of arbitrability determined by the nature of the defense on the merits. Nothing could be further from the truth. Appellant does not even argue the question of its right to retire the 68-year-old employees. It does argue that it has

the right to make exceptions from the arbitration provisions of the collective bargaining contracts and that it was the specific intent of the parties to make such an exception in the case of the pension plans. Just as in the case of wages and differentials which are not subject to arbitration, the pension plan disputes have likewise been excepted from the arbitration provisions of the collective bargaining agreements.

Reference is made in appellees' brief to the fact that appellant did not include a clause in its collective bargaining agreement excluding the disputes that might arise because of any action taken under the provisions of the pension plans. Appellees knew shortly after October 15, 1954, that the appellant was refusing to arbitrate a dispute arising under the provisions of the pension plans. Yet, although the appellant voluntarily agreed to reopen the pension plans for negotiation in June of 1956, no attempt was made by the union to amend the pension agreements and plans to eliminate the restrictive clauses such as Section 9 of the agreements and Sections 4 and 5 of the plans. It would seem apparent that appellees accepted the position of appellant as being correct at that time. It was not until October 22, 1957, that this suit was filed. Thus for a period of almost three years the appellees passively accepted the interpretation of the appellant. Certainly it was up to them to change the plans and agreements in 1956 if they disagreed with appellant.

CONCLUSION

We respectfully submit that appellees have failed to

answer the arguments which we have submitted in our brief of appellant and that the judgment for appellees should be dismissed with directions to enter a judgment in favor of appellant.

Respectfully submitted,

W. M. KIRKPATRICK,
P. L. MacDONALD,
SAM STEPHENSON, JR.,
JOSEPH B. WOODLIEF,
R. LEWIS BROWN, JR.,
WILLIAM J. KELLY,

Hennessy Building,
Butte, Montana,

Attorneys for Appellant.